

15 May 2018

Hon. J Fubbs MP, Chair, Portfolio Committee on Trade and Industry
Hon. LC Theko MP, Chair, Sub-Committee on the Copyright Amendment Bill
Parliament of the Republic of South Africa
CAPE TOWN

By email only to:

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Dear Honourable Fubbs, dear Honourable Theko

COPYRIGHT AMENDMENT BILL, NO 13 OF 2017: Supplementary submission on Exceptions for Libraries, Archives and Museums by the Publishers Association of South Africa (PASA) and the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd (DALRO)

We are writing to restate our position on exceptions for libraries as it appears in our written and oral submissions of July and August 2017.

Our supplementary submission arises from:

- Recent proposals before your Committee that, with a refocusing of the Bill on specific provisions, exceptions for libraries, archives and museums will still be considered.
- The latest working document of the draft B-Bill, retaining the original Bill's proposed new Section 19C, retaining, with new substantive changes, the proposed new Section 12D(7) and inserting a new Section 39B(a).

Publishers' position on exceptions for libraries, archives and museums

In general, publishers accept that exceptions to copyright to enable libraries, archives and museums to carry out their work are a part of the copyright ecosystem. PASA and DALRO support targeted exceptions for libraries that meet the Three-Step Test of the Berne Convention. We refer you to PASA's submission of 7 July 2017, specifically to pages 2-4 of PASA's 2009 position statement *Copyright and the Public Interest*, included on the 51st to 53rd pages of the submission.

PASA and DALRO's position on exceptions for libraries, archives and museums in the Bill

PASA and DALRO submit that most of the library-related exceptions in the proposed new Sections 12D and 19C, as read with Section 39B, remain unacceptably broad, which could lead to detrimental consequences described more fully below. We have also stated our

opposition to the introduction of the 'fair use' exception, which contains specific provision for libraries, archives and museums.

No impact assessment has been carried out on the economic effect of these, and other, extremely broad exceptions contained in the Bill. A proper impact assessment must be a prerequisite for embarking on legislative provisions that are likely to have as invasive an economic impact as the exceptions proposed in the Bill.

The SEIAS Report for the Bill is insufficient and cannot be relied upon to support the very broad exceptions for libraries, archives and museums proposed in the Bill. On this topic, it simply recounts the interests of various parties - incorrectly, in the case of publishers. The Report has no indication of any independent study having been done. On the contrary, the SEIAS Report does not list the need for library exceptions under its "Problem Statements", nor does its own Impact Assessment deal with the proposed library exceptions in Sections 12D and 19C. The SEIAS Report only contains a bald and unsubstantiated statement under "Consultations": "Academics and Libraries: The provision for 'fair use' of copyright works will offer access to educational materials and enhance learning and research." This sentiment is simply not true, as pointed out in the submissions and position papers of PASA and other publishers, such as the International Publishers Association.

There is a wide range of resources available, an obvious first port of call being the study carried out for WIPO by Prof Kenneth Crewes, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised* (2017).

All the exceptions in Section 12D allow for free uses of copyright works, notwithstanding their commercial availability or the existence of licences for such uses, which therefore conflict with the normal exploitation of the works in question and are unreasonably prejudicial to the legitimate interests of the copyright owners. Section 12D(7), as updated in the latest working document, has provisions giving a privileged position to libraries of making certain works available under an "open licence", thereby in effect removing them from copyright protection altogether. (We refer you to the extensive analysis of the original version of Section 12D(7) in the July 2017 submission of the International Association of Scientific Technical and Medical Publishers.) The whole of Section 12D, as well as Section 37B (please refer to our earlier submissions on the point of blanket overriding of contracts) must therefore be scrapped.

A number of the exceptions in Section 19C are not needed, since they are not exceptions to rights of copyright. For instance, subsection (2) seems to be an exception to a lending or rental right, which has never existed in South Africa; subsection (8) allows already-permitted legal deposit; and subsection (10) allows cross-border purchases of works that may well be allowed anyway.

On the other hand, some provisions of Section 19C will be in conflict with South Africa's obligations under the Berne Convention. For instance, whereas the intention of subsection (3) may have been to permit inter-library sharing of digital works in response to legitimate requests by patrons of receiving libraries, it has been so broadly cast so that it will allow libraries free rein to distribute digital works to anybody without permission, thereby competing with rightsholders' legitimate commercial offerings.

PASA and DALRO's proposals for exceptions for libraries, archives and museums developed from proposed new Section 19C in the Bill

In respect of the remaining provisions in Section 19C, we believe that middle ground that is compliant with the Berne Convention can be found. PASA has already stated as long ago as 2009, in position statement *Copyright and the Public Interest*, that publishers support exceptions in favour of libraries for the following purposes:

- Copying of copyright works in libraries' collections for preservation. By "preservation", it is understood that such copies are not made available during the term of the copyright and thereby competing with their commercial offerings.
- Making scanned copies of analogue works that are not available in electronic format, for on-the-spot consultation on dedicated terminals within library premises.
- Copies of works not available in commerce for inter-library delivery.
- Making available of 'orphan works', which would only be classified as such after the library has unsuccessfully carried out a prescribed diligent search to find the copyright owner, subject to the copyright owner being entitled to fair compensation if he or she subsequently appears and claims in respect of that use of the work previously thought to be an orphan work.

Publishers are also open to discuss other exceptions which fall within the parameters of the Three-Step Test of the Berne Convention.

If one considers the remaining exceptions of Section 19C, in order to be compliant, many of those cases must be made subject to:

- the uses being of lawfully acquired works in the library collection (where applicable, the collection of the library or museum, as the case may be) and
- there being no commercially available version of the work concerned or to there being no existing licence to allow the use concerned.

In other cases, there must be cognisance of the situation where the library is an intermediary, so that the use concerned should only be permitted if the patron requesting the copy or copyright-protected form of access is also acting under an exception. Certain specific exceptions under this heading could be made subject to a ban on contract override, but, as submitted before, Section 37B must be removed. For all cases, there will have to be a proper definition of "libraries, archives and museums" to the effect that they are public institutions or not-for-profit institutions that are open to the public.

Noting the latest decisions by the Committee, Section 19C(5) will become superfluous.

Library exceptions are already dealt with in Chapter I of the Copyright Regulations, 1978 (as amended in 1985). These Regulations would have to be reviewed in conjunction with a new section on exceptions for libraries, archives and museums.

We look forward to be able to engage with the Committee in redrafting the library exceptions if they are to be retained in the Bill.

Yours faithfully



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